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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

NAAMAN E. KING and MARIAN KING,

Petitioners,

vs.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL CO., a Division of Sterling Drug, Inc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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STATEMENT OF JURISDICTION

This Court's substantive jurisdiction is based upon 28 U.S.C. § 1254(1) as the petition for the writ of certiorari intended to bring before the Court a judgment in a civil action rendered by the United States Court of Appeals for the Third Circuit. This

Court's procedural jurisdiction is based upon 28 U.S.C. § 2101(c) as the petition for writ of certiorari was applied for within ninety (90) days after the entry of the Third Circuit Court's judgment in this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment X to the Constitution of the United States and the Rules of Decision Act of 1789, 28 U.S.C. § 1652 are the pertinent constitutional and statutory provisions in this diversity case. The law to be applied is that of the state. The United States Court of Appeals for the Third Circuit has predicted that Pennsylvania would adopt the federal common law principles enunciated in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). Since the Pennsylvania Supreme Court has not yet decided any cases under the rule of *East River*, nor has it rejected that formulation of the law, the prediction by the Court of Appeals of state law governs the instant matter. The law to be applied has never been a contested issue, and petitioners assume that respondent is not now arguing the point.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI RAISES THE IMPORTANT QUESTION OF INTERPRETATION OF FEDERAL COMMON LAW WHICH HAS BEEN ADOPTED AS THE LAW OF THE STATE IN THIS DIVERSITY ACTION.

Rule 17 of the Supreme Court Rules expressly recognizes that no list can encompass every special and important reason justifying the exercise of this Honorable Court's powers of review. The specific categories set forth in subsections (a)-(c) are illustrative, not exclusive.

The instant matter presents an unusual question, of broad applicability, which may not fit precisely within the categories of Rule 17 but shares their character. Subsection (c), in particular, provides that review is warranted "when a federal court of appeals has decided an important question of federal law which has not been but should be, settled by this Court." In this diversity case, the lower court technically rendered its decision based on state law, but in fact applied the federal common law of *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986).

In the case of *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, *cert. denied*, ____ U.S. ____, 108 S. Ct. 156, 98 L. Ed. 2d 111 (1987), the United States Court of Appeals for the Third Circuit predicted that the Pennsylvania Supreme Court would abandon current state law concerning recovery in tort for economic losses resulting from damage caused by a product to itself, and adopt the law announced by this Court in *East River*. The state Supreme Court has not yet addressed the issue. Therefore, where the tort/warranty issues of *East River* are raised in Pennsylvania's federal courts, "state law" is, in substance, federal common law.

Recovery in tort continues to be available for property losses resulting from damage caused by another product, but not the "product itself." Therefore, correct resolution of such claims is absolutely dependent on the proper threshold analysis of the nature of the subject property. Petitioners respectfully submit that the Court of Appeals erred in its analysis of this exceptionally significant issue, and in failing to identify the question as one of fact to be resolved by a fact finder, not an appellate court. These important questions have not been, but ought to be, decided by this Court. They build upon, and constitute necessary development of, the law announced by this Court in *East River*, not only predicted to be Pennsylvania law but adopted as the

law of virtually all of the state and federal courts which have considered it.

It is not merely the black letter holding of *East River* which has been followed by state and federal courts alike. The thorough and cogent reasoning of this Court, addressing the underlying policy considerations of risk allocation in tort and warranty, persuasively commended adoption of the law. The courts have looked to this Court for direction, and accepted its authoritative formulation. The petition for writ of certiorari should be granted because only this Court can, as it did in *East River*, properly provide to these lower courts the appropriate conceptualization of the issues and interests at stake here and in property damage cases across the nation.

It is not controverted that the Third Circuit sought to apply *East River*. There is no other "Pennsylvania law" upon which this case was decided. The lower court, however, misapprehended the critical inquiry into the relationship between the defective and damaged properties. The question presented should be reviewed by this Court, as a further clarification of the availability of the remedies of tort and warranty for property damage under the law and policy of *East River*, whether applied directly as federal common law or as the adopted law of the several states.

Respectfully submitted,

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